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HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 517 OF 2001

DIVISION BENCH: HON'BLE SHRI L.C. BHADOO &
HON'BLE SHRI DHIRENDRA MISHRA, JJ

APPELLANTS : KAWAL SAI AND ANOTHER

VERSUS

RESPONDENT : THE STATE OF CHHATTISGARH

JUDGMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

HON'BLE SHRI L.C.BHADOO, J

Sd/-
L.C.BHADOO
Judge
.07.2007

POST FOR JUDGMENT ON 24th JULY, 2007

Sd/-
DHIRENDRA MISHRA
Judge

(168)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 517 of 2001

Division Bench : **Hon'ble Shri L.C. Bhadoo &**
Hon'ble Shri Dhirendra Mishra, JJ

APPELLANTS :

1. Kawal Sai, S/o Kunwar Sai Uraon, Aged about 30 years.

2. Shiv Prasad S/o Kunwar Sai Uraon Aged about 26 years.

All resident of village Deo Nagar, Thana Surajpur, District-Sarguja (C.G.)

Versus

RESPONDENT : The State of Chhattisgarh.

Present:
Shri R.P. Tripathi, learned counsel for the appellants.
Shri G.D. Vaswani, learned G.A for the State/respondent.

JUDGMENT
(Delivered on 24/07/2007)

Per Dhirendra Mishra, J

This criminal appeal is directed against the impugned judgment dated 30th April 2001 passed in S.T.No. 101/99 whereby the learned Additional Sessions Judge,Surajpur District Sarguja after holding the accused/appellants guilty of causing homicidal death of deceased Nandu, has convicted each of them under Section 302 and 302/34 of the Indian Penal Code and sentenced them to undergo life imprisonment, pay a fine of Rs.1000/-each and in default of payment of fine, to further undergo R.I. of ten months. Appellant Shiv Prasad has also been convicted under Section 323 of the IPC and sentenced to undergo R.I. of six months. All the sentences imposed for commission of the offence, have been directed to run concurrently.

2. Case of the prosecution, in brief, is that on 4.9.1998 around 9.00 p.m., the day of Karma festival in village Devnagar, deceased Nandu after having his dinner was proceedings towards his new house situated about one furlong away from his old house when accused persons Shiv Prasad, Kanwal Sai and Kunwar Sai assaulted him with iron rod and kicks. Hearing his shouts his wife Jaimani (PW-1) and Dhansai (Pw-2) went there and tried to intervene, on

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which accused/appellant Shiv Prasad assaulted Dhansai also with iron rod. Nandu (since deceased) died at about 2.00 in the night, as a result of grievous injuries sustained by him. Merg intimation (Ex.P/1) and First Information Report (Ex.P/2) were lodged on following day in Police Station Surajpur by PW-2 Dhansai, nephew of Nandu. Inquest report of Ex.P/5 was prepared in the presence of witnesses. Bloodstained and plain soil was taken into possession vide Ex.P/6 from the place of occurrence. Bloodstained iron rod was taken into possession from accused Kanwal Sai vide Ex.P/7. Spot map of Ex.P/8 was got prepared by PW-8 Ram Gopal, Halka Patwari. Injured Dhansai was sent for medical examination to Community Health Center, Surajpur vide Ex.P/9 where Dr. Indrajeet Gupta (PW-10) examined him and gave his report of Ex.P/9-A. Dead body of Nandu was sent for autopsy to Community Health Center, Surajpur vide Ex.P/10 where Dr. Indrajeet Gupta (PW-10) conducted postmortem and submitted his report of Ex.P/10-A. Site plan was prepared by the investigating officer Harishchandra Naharkar (PW-9). Iron rod, weapon of offence, was sent for examination to Dr. Indrajeet Gupta, C.H.C., Surajpur vide Ex.P/12, on which the doctor after examination of the weapon opined that injuries present over the deceased Nandu could be caused by the said rod vide his report of Ex.P/12-A. Seized articles i.e. bloodstained & plain soil and iron rod were sent for chemical examination to Forensic Science Laboratory, Sagar vide Ex.P/16 and report of the F.S.L. is Ex.P/17.

3. After completing investigation charge sheet was filed against the accused persons in the Court of Additional Chief Judicial Magistrate, Surajpur who in turn committed the case to the Court of Sessions Judge, Ambikapur, Sarguja and the same was received on transfer by learned Additional Sessions Judge, for trial.

4. Charge under Sections 302 or in the alternative 302/34 of the IPC was framed against the accused/appellants and accused Kunwar Sai. In addition to the above, charge under Section 323 of the IPC was also framed against accused/appellant Shiv Prasad. The accused persons abjured their guilt. Prosecution in order to establish the charges against the accused persons examined 10 witnesses. Thereafter, statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the

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material appearing against them in the prosecution case and pleaded innocence and false implication. They also examined Bindeshwar (DW-1) and Dr. Koushlendra Nath Sharma (DW-2) as defence witnesses.

5. Learned Additional Sessions Judge after hearing counsel for both the parties convicted and sentenced the accused/appellants as mentioned in paragraph -1 of this judgment. However, accused Kunwar Sai was acquitted of all the charges.

6. Homicidal death of deceased Nandu is not in dispute. Even otherwise, from the statements of Jaimani (PW-1), wife of the deceased, Dhansai (PW-2) and Dr. Indrajeet Gupta (PW-10) who conducted postmortem and proved his report of Ex.P/10-A in which he noticed following injuries and opined that cause of death was coma as a result of brain hemorrhage and it was homicidal in nature, it is established that death of Nandu was homicidal in nature.

On external examination

(i) lacerated wound 3" x 1/8" x 1/10" on front left leg at middle.

(ii) Lacerated wound 2 ½" x 1/8" x 1/10" on front of left leg below injury No. one.

(iii) Lacerated wound 1" x 1/8" x 1/10" below leg.

(iv) Lacerated wound 2" x 1/8" x1/10" on front of right leg.

(v) Lacerated wound 2 ½" x 1/8" x 1/10" above injury No. four.

(vi) Bruise 4" x 3" on left shoulders.

(vii) Bruise 3" x 2 ½" on left side chest.

(viii) Left femour bone was fractured at middle.

(ix) Bruise 4" x 3" plus Heamatoma on right temporal bone and the temporal bone was slightly depressed.

On internal examination

(i) Right temporal bone was fractured at two places, first is 2" x linear and second 1 ½" linear.

(ii) Right parietal bone was fractured in front part close to temporal bone 1" x linear. Brain Heamorrhage was found in both the Hemisphere.

(iii) Left femour bone was fractured at middle.

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7. Learned counsel for the accused/appellants submitted that all the three accused persons were prosecuted under Section 302/34 of the IPC and case of the prosecution is that they all assaulted deceased Nandu with a common intention of causing his death, however, on the similar evidence the Court below has acquitted co-accused Kunwar Sai, therefore, it is evident that the prosecution has failed to prove common intention of all the accused persons for causing death of deceased Nandu. It is further argued that the alleged eyewitness PW-1 Jaimani, wife of the deceased, in her court evidence has stated on oath that appellant Kanwal Sai assaulted her husband with hammer and appellant Shiv Prasad with rod, but in her diary statement of Ex.D/1 this fact is missing. The fact that she reached the place of incident and intervened is also missing. Similarly, witness Dhansai (PW-2) who has also claimed himself to be an eyewitness and lodged the F.I.R., has made material improvements in his deposition before the Court.

8. Reliance is placed on the judgment in the matter of **Halim Mian and others Vs. The State of Bihar** reported in **AIR 1971 S.C. 1826** and it is submitted that where the prosecution fails to prove the common intention and there is no evidence to ascertain that any particular accused caused any particular injury, the question of constructive liability has to be ruled out and none of the accused persons could have been convicted.

9. Further relying upon the judgment in the matter of **State of West Bengal Vs. Vindu Lachmandas Sakhrani alias Deru** reported in **AIR 1994 S.C. 772,** it is argued that where common intention under Section 34 is a core of charge, one of the accused has been acquitted of the above charge, no independent charge under Section 302 of IPC is framed against the another accused and there is no evidence showing that the another accused independently committed the crime, another accused cannot be convicted for the offence.

10. Learned counsel also placed reliance on the judgment reported in **1997(1) M.P.W.N. 94**, in the matter of **Kheek Ram Vs. State of M.P.** and argued that police statements under Section 161 of Cr.P.C. are the very foundation of prosecution case and no witness can be relied on for a fact which he has not stated in his police statement.

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11. On the other hand, learned counsel for the State/respondent supported impugned judgment of the trial Court.

12. We have heard learned counsel for the respective parties and have perused the material available on record.

13. PW-2 Dhansai is the injured eyewitness. He sustained injuries in the same incident and was examined by Dr. Indrajeet Gupta (PW-10) who has proved his injury report of Ex.P/9-A. He has also lodged the F.I.R. naming the accused persons as assailants. Thus, presence of this witness on the spot at the time of incident is established. This witness has stated that on the date of incident, wife of deceased Jaimani came to him around 8-9 p.m. and told him that accused persons Shiv Prasad, Kanwal Sai are assaulting her husband, whereupon he went to the place of incident and saw that Nandu was lying on the ground, Kanwal Sai and Shiv Prasad were assaulting him and Kunwar Sai, the acquitted accused, was standing at a distance. When he tried to lift Nandu, Shiv Prasad assaulted him with a rod on his head, as a result of which he became unconscious and he was taken to home. In the morning at about 4.00 wife of Nandu again came to his home and informed that Nandu has died. Thereafter he along with watchman went to Surajpur police station and lodged Merg intimation of Ex.P/1 and F.I.R. of Ex.P/2. He has also stated that he was referred for examination to the doctor where the doctor had given him preliminary treatment and stitched the wound over his head. This witness has been cross-examined at length by the defence counsel, however, he has stuck to his claim that he had seen the incident and the appellants assaulting deceased Nandu. The defence has not been able to elicit any circumstance which makes the evidence of this witness untrustworthy or unreliable. The statement of this witness is corroborated, in material particulars, by the statement of PW-1 Jaimani who also claims herself to be an eyewitness of the incident. Though there are some inconsistencies in the statement of PW-1 Jaimani, however, we are of the considered opinion that the statement of PW-2 Dhansai, the injured eyewitness who lodged the F.I.R. promptly inspires confidence. His version is corroborated by the promptly lodged FIR as also from the statement of Dr. Indrajeet Gupta (PW-10) who has proved the postmortem report.

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14. Now coming the judgments cited by learned counsel for the accused/appellants. In the matter of **State of West Bengal Vs. Vindu Lachmandas Sakhrani alias Deru (supra)**, no independent charge under Section 302 of the IPC was framed against the accused persons and there was no independent evidence regarding participation of the accused who had been convicted in the said offence and in these circumstances, the Hon'ble Supreme Court in the absence of independent charge under Section 302 of IPC when the accused is charged under Section 302/34 of IPC and other accused person is acquitted of the above charge, has held that in such circumstances, the another accused cannot be convicted for the offence with the aid of Section 34 of IPC. Similar is the law laid down in the matter of **Halim Mian** (supra) and both the above cited judgments are distinguishable on facts. In the present case, accused Kunwar Sai has been acquitted because injured eyewitness has not attributed any overt act to this accused as he was standing at some distance at the time of incident.

15. So far as the judgment in the matter of **Kheek Ram** (supra) is concerned, it is true that a witness cannot be relied on for a fact which he has not stated before the police in his statement, however, as we have already pointed out in the foregoing paragraphs that there is no major omissions, or improvements in the statement of complainant Dhansai and the omissions pointed out are trivial in nature, which do not go to the root of the matter, therefore, simply on the basis of some trivial omissions in the diary statement of Ex.D/2 of the complainant Dhansai, his evidence cannot be discarded.

16. For the reasons stated above, we are of the considered opinion that conviction of the appellants under Section 302 of the IPC and conviction of appellant Shiv Prasad under Section 323 of the IPC, is based on proper appreciation of evidence available on record and the prosecution has been able to prove its case beyond reasonable doubt and there is no illegality or infirmity in the impugned judgment of the trial Court.

17. In the result, the appeal being devoid of substance is liable to be dismissed and is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge